SUPREME COURT OF DELAWARE
March 1, 2022

The Honorable David P. Sokola
President Pro Tempore
Delaware State Senate

The Honorable Peter C. Schwartzkopf
Speaker
Delaware House of Representatives

Dear President Pro Tempore Sokola and Speaker of the House Schwartzkopf:

Senate Concurrent Resolution No. 63 requests the opinion of the Justices on the construction of Article III, Section 13 of the Delaware Constitution. The Supreme Court appointed amici counsel on January 26, 2022, to help answer the General Assembly's questions. We have their submissions in hand and thank the attorneys for their volunteer service to the Court and to the State. What follows are the questions and summary answers. We then explain our answers in more detail.

1. May "reasonable cause" under Section 13 include an indictment returned by a grand jury?

   Reasonable cause for a bill of address to the Governor may include an indictment, but an indictment standing alone is not sufficient.

2. Does the authority under Section 13 to remove a public official implicitly include the authority to take a lesser action, such as suspension of that public official? If Section 13 does implicitly include the authority to take a lesser action, must the General Assembly address the Governor on the lesser action or can the Governor choose to take a lesser action than that addressed to the Governor?

The Governor's authority to remove a public official upon a bill of address does not include the authority to take a lesser action such as suspension.

3. Does the application of Section 13 require a hearing on the matter prior to a vote in either House to address the Governor to remove an officer?

A hearing is required prior to the vote on a bill of address.

   a. If the application of Section 13 requires a hearing, must each House hold a hearing prior to its respective vote to address the Governor, or does a hearing in the first House satisfy the requirement?

A hearing in the first House or a joint hearing in both Houses satisfies the hearing requirement.

   b. If the application of Section 13 requires a hearing in each House, would a joint hearing satisfy the requirement?

As noted in our response to Question 3(a), a hearing in the first House or a joint hearing satisfies the hearing requirement.

   c. If the application of Section 13 requires a hearing, what are the elements that must be satisfied? For example, must the person against whom each House seeks to proceed be provided the opportunity to attend the hearing, to be represented at the hearing by counsel, to testify at the hearing, to call witnesses, or to introduce evidence at the hearing?

Both Houses would issue a joint notice ten days prior to the hearing. The individual must have a hearing, which preferably would include the right to attend, be represented by counsel, call witnesses, and introduce evidence. The other parameters of the hearing are within the discretion of the General Assembly.

4. Does Section 13 require a 10-day notice for only the first House to take action, or are separate notices required for each House? If Section 13 requires separate 10-day notices for each House's action, may those notices be issued concurrently, or must the second House issue its notice only after the first House has acted pursuant to its respective notice?

A Joint Resolution by both Houses is required at least ten days before the hearing in the first House or before a joint hearing.

5. Is there a mechanism for an appeal of the decision by the Governor to remove a public officer under Section 13?

There is no appeal from the Governor's decision. We do not express an opinion on whether judicial review is available through other avenues.

I.

Section 13 of Article III of the Delaware Constitution provides as follows:

§ 13. Removal of officers by Governor; procedure.

Section 13. The Governor may for any reasonable cause remove any officer, except the Lieutenant-Governor and members of the General Assembly, upon the address of two-thirds of all the members elected to each House of the General Assembly. Whenever the General Assembly shall so address the Governor, the cause of removal shall be entered on the journals of each House. The person against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied with the cause alleged for his or her removal, at least ten days before the day on which either House of the General Assembly shall act thereon.

When a constitutional provision is unambiguous, we rely on its plain language.[1] Section 13 is unambiguous in certain respects. Other than the Lieutenant Governor and members of the General Assembly, the Governor may—not must—remove any public officer for reasonable cause if the General Assembly presents a bill of address to the Governor, after a vote by two-thirds of each House. The individual to be removed must receive at least ten days' notice of the bill of address

[1] *Capriglione v. State*, ___A. 3d___, 2021 WL 4538685, at *3 (Del. Oct. 1, 2021) (quoting *In re Request of Governor for Advisory Opinion (Pepukayi)*, 950 A.2d 651, 653 (Del. 2008)).

and the cause alleged for removal. What is missing from Section 13, however, and no doubt caused the General Assembly's request for an Opinion of the Justices, are details about how to undertake a bill of address, what constitutes reasonable cause, and the rights of the public officer involved.

When a constitutional provision is ambiguous, or its application uncertain, we examine other sections of the Constitution that give meaning to the provision under consideration.[2] We also look to the Delaware Constitutional Debates of 1897 ("Delaware Debates") to see what the Framers intended.[3] In the words of Justice William Spruance, who was intimately involved in drafting the Delaware Constitution: "In ascertaining the meaning of a remedial provision of a constitution or statute, where the language is not clear, it is often necessary to consider the mischiefs intended to be prevented."[4] The Delaware Debates are especially relevant

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[2] *Frieszleben v. Shallcross*, 19 A. 576, 595 (Del. 1890) ("To ascertain this, resort must be had to a proper construction of the entire instrument."); *McComb v. Robelen*, 116 A. 745, 747 (Del. Ch. 1922) (using different constitutional provisions to construe an earlier provision).

[3] *Capriglione*, 2021 WL 4538685, at *3 (citing *Pepukayi*, 950 A.2d at 653). *See also Opinion of the Justices*, 264 A.2d 342, 344 (Del. 1970) ("In view of the ambiguity, we look to the Delaware Constitutional Debates of 1897 for insight into the intent of the drafters . . . ."); *Dorcy v. City of Dover Bd. of Elections*, 1994 WL 146012 at *4 (Del. Super. Mar. 25, 1994) ("The debates of the 1897 Constitution drafters can be important authority to interpret our constitution."); *State v. Hart*, 129 A. 691, 697 (Del. Super. 1925) ("If, however, there was any real doubt as to what the Constitution makers meant, it would be entirely removed by referring to said debates . . . .").

[4] *State v. Churchman*, 51 A. 49, 61 (Del. 1902) (Spruance, J., dissenting).

here because the Delaware Constitution of 1897 was not ratified by the public, but adopted by the same men who debated the provisions (the "Delaware Delegates").[5]

Finally, to help interpret Section 13, we examine a similar provision in the 1874 Pennsylvania Constitution and the relevant debates of the Pennsylvania Constitutional Convention (the "Pennsylvania Debates"). While it is unclear whether the Delaware Delegates relied on the Pennsylvania Debates, the Pennsylvania Debates occurred relatively close in time and location to the Delaware Debates, and Spruance, who introduced Article III, Section 13, relied on a comparable provision in the Pennsylvania Constitution of 1874 to draft Section 13.[6]

A.

Having identified textual ambiguities, we begin our construction of Article III, Section 13 by examining other provisions of the Delaware Constitution that shed light on how Section 13 was intended to operate. Using the Pennsylvania Constitution as a model, Spruance explained that the new Delaware Constitution would provide three methods for removal of officers:

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[5] *State v. Lyons*, 5 A.2d 495, 501 (Del. Gen. Sess. 1939) ("Where the debates of a Constitutional Convention clearly point out the purpose of a particular provision of the Constitution, the aid of such debates is valuable and satisfactory. Especially is this true when the Constitution became effective, as in Delaware, upon its adoption by the Convention, and was not subject to subsequent ratification by vote of the people." (citing 1 Cooley Const. Law 142; 11 Am. Jur. 706)).

[6] 3 Charles G. Guyer & Edmond C. Hardesty, Debates and Proceedings of the Constitutional Convention of the State of Delaware 1938 (Milford Chronicle Publ'g Co. 1958) (1897) ("I want to show the gentlemen a corresponding provision in the Pennsylvania Constitution. . . . That is substantially the same as we have here") (hereinafter "Delaware Constitutional Convention").

> There are three ways of getting rid of an officer. One is, under these lines, on misbehavior in office, or any infamous crime, and the Governor shall remove that man, because it is his duty to do so. That means where he has been convicted on indictment of misbehavior in office or infamous crime. The next deals with removal on the address of the legislature; and then we have the third one, that of impeachment.[7]

Article XV, Section 6 addresses removal from office by the Governor for criminal convictions:

> All public officers shall hold their offices on condition that they behave themselves well. The Governor shall remove from office any public officer convicted of misbehavior in office or of any infamous crime.

Thus, the Governor must remove a public officer when the officer is convicted of certain crimes. A public official can also be removed from office after impeachment proceedings in the House and a trial in the Senate:

> The Governor and all other civil officers under this State shall be liable to impeachment for treason, bribery, or any high crime or misdemeanor in office. Judgment in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under this State; but the party convicted shall, nevertheless, be subject to indictment, trial, judgment and punishment according to law.[8]

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[7] *Id.* at 1937. *See also State ex rel. Craven v. Schorr*, 131 A.2d 158, 166 (Del. 1957) (The three "constitutional grounds for removal are: (1) by the Governor, upon the address of two-thirds of all the members elected to each House, art. III, § 13; (2) by impeachment by the House and trial by the Senate, art. VI, § 2; and (3) by the Governor, upon conviction of misbehavior in office or any infamous crime, art. XV, § 6.").

[8] Del. Const., art. VI, § 2. Article II, Section 21 also sets forth disqualifying events for holding certain public positions and requires a conviction to disqualify an individual: "No person who shall be convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to a seat in either House of the General Assembly, or capable of holding any office of trust, honor, or profit under this State." *Id.* at art. II, § 21.

Section 13 does not mention conviction. It refers only to "reasonable cause" for removal. As our review of the Delaware and Pennsylvania debates shows, a bill of address—with its reasonable cause requirement—was intended to cast a wider net and covers misconduct by public officials that might lead to criminal charges but not necessarily end in a criminal conviction.

B.

We turn to the Delaware Debates. The Delaware Delegates adopted the most recent Delaware Constitution on July 4, 1897.[9] The debates and proceedings leading to its adoption took place from December 1, 1896, through June 4, 1897.[10] The discussions often drew from the recently adopted Pennsylvania Constitution of 1874, in both language and practice.

William C. Spruance, a lawyer and delegate, introduced Article III, Section 13. He explained that he found the "provision in the Constitution of Pennsylvania and it is a good safe one."[11] The Delaware Delegates first discussed requiring removal from office if an officer had been "convict[ed] of misbehavior in office or of any infamous crime" and agreed that when an individual "has had his day in

[9] Secretary of State, Constitution of the State of Delaware (Dover, Press of the Delawarean 1899). There were three previous Constitutions, adopted in 1776, 1792, and 1831. Del. Const. of 1776; Del. Const. of 1792; Del. Const. of 1831.

[10] Henry R. Horsey, Henry N. Herndon, Jr. & Barbara MacDonald, *The Delaware Constitutional Convention of 1897: Dec. 1, 1896-June 4, 1897, in The Delaware Constitution of 1897: The First One Hundred Years* 58 (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997).

[11] Delaware Constitutional Convention at 1937.

Court, and he has been indicted and he has been convicted[,]" "he certainly ought to come out of office."[12] The Governor was therefore required, under the new Constitution, to remove any officer who had been convicted.[13]

After agreeing on the infamous crime provision, the Delaware Delegates considered removal by bill of address to the Governor. Spruance, the author of Section 13, explained that the Governor could not remove appointed officials without cause under the provision—a crucial difference from the Pennsylvania Constitution of 1874.[14] He also stressed that the Delaware provision was "more carefully framed and safer" than its Pennsylvania counterpart because it required a vote of two-thirds of the General Assembly rather than just two-thirds of the Senate.[15] He gave an example of conduct which would justify removal:

> And we have had an instance in the two late Honorable gentlemen who were on the Judiciary, and who had come to the condition of health and mind and body that they could not perform their functions, and unless they had resigned, there would have been no way of carrying on the business of the Courts except by their removal by the General Assembly.[16]

The Delaware Delegates then extensively debated the notice requirement.[17] William Saulsbury, a lawyer and member of the Delaware House of Representatives,

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[12] *Id.*
[13] This provision was later moved elsewhere in the Constitution. Del. Const., art. XV, § 6.
[14] Delaware Constitutional Convention at 1938.
[15] *Id.*
[16] *Id.* at 1939.
[17] *Id.* at 1939–46.

worried that the notice requirement was "needlessly long" because it would require ten days' notice from the House of Representatives, followed by ten days' notice from the Senate, before the Houses could bring proceedings against the individual.[18] He also pointed out that the individual was "entitled to have a hearing before that house," a hearing that could "take several days" in each House.[19]

Spruance disputed that understanding: "I do not understand that it is to be two notices at all. . . . When charges were made against a man, the General Assembly would pass a joint resolution. . . . It seems to me that one notice is enough."[20] Saulsbury conceded the point: "I supposed from this language that it certainly meant that a person should receive ten days notice from each house . . . if it is to be by joint resolution of both houses, I do not think ten days notice is too much, that is, one ten days notice."[21] Finally, Wilson T. Cavender spoke:

> The spirit of the language of this section, it seems to me, is very clear that this notice should be given in the shape of a joint resolution. It seems to me it would not be proper in any other shape.
>
> What is the General Assembly? The General Assembly is not the House, nor the Senate separately, but it is the Senate and House both, and a notice coming from the General Assembly would come in the shape of a joint resolution.[22]

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[18] *Id.* at 1940.
[19] *Id.*
[20] *Id.* at 1941.
[21] *Id.* at 1942.
[22] *Id.* at 1945.

Saulsbury agreed, and confirmed the consensus among the Delaware Delegates:

> [A]s the other Members of the Committee are so entirely in the majority, who think the other way . . . that only one notice would be required under this provision, I feel inclined, if there is no objection, to withdraw my proposed amendment. . . . I thought there were two notices required, and that was the ground for my amendment.[23]

They also debated the nature of the hearing, and where it should take place. Saulsbury believed the language required a joint trial,[24] but Spruance replied that he thought the provision required only ten days' notice before the hearing in the first House—and that the other House could then proceed to address the Governor without having its own, independent hearing.[25] This is supported by the discussion between Ezekiel Cooper, another delegate, and Spruance, about whether a Senator could vote to send a bill of address to the Governor without being present at the proceedings taking place in the House:

> EZEKIEL W. COOPER: Yes; but is a Senator going to agree to issue an address to the Governor to remove an officer when he has heard no statement of the case, or no trial, or when the trial has been in the House?
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> WILLIAM C. SPRUANCE: I do not know. If that testimony was taken in writing and brought up, it might be sufficient. I do not know how that may be.

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[23] *Id.* at 1946.

[24] *Id.* at 1944 ("WILLIAM SAULSBURY: I like in some respects the suggestion of the gentleman from North Murderkill Hundred (Mr. Cooper), to let the trial be in joint Assembly, but I would require when the vote is taken that there shall be a separate vote.").

[25] *Id.* ("But ten days upon which either house, that means the first one that has the hearing.").

EZEKIEL W. COOPER: Legislative enactment would provide the formula, would it?

WILLIAM C. SPRUANCE: I think so.[26]

The Delaware Delegates thought the number and structure of hearings would be a matter of preference for the legislature—each House of the General Assembly was entitled, but not required, to have its own proceeding. If the second House believed that the first hearing had shown reasonable cause, it was entitled to vote on the bill of address without a second hearing.[27]

The nature of the hearing also came up in the Debates. At various times, the Delaware Delegates discussed allowing enough time for the individuals to provide a defense to the charges laid against them.[28] One delegate referred to the hearing as a jury trial, distinguishing it from the process for impeachment.[29] Again, the Delegates reached agreement: "A man is entitled, when he gets this notice, to a hearing, and in the question of introducing testimony, and the things that are to be brought in . . . ."[30] It appears the Delegates intended the hearing to afford the

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[26] *Id.* at 1945.
[27] *Id.*
[28] *Id.* at 1941 ("It is a matter of a great deal of consequence that when a man is about to be proceeded upon, that he have proper notice to defend himself. Five days is pretty short notice for a man to be brought up in a round term, and to say to him, 'We are going to kick you out of office', and to furnish him with the charges and give him only five days in which to make his defense.").
[29] *Id.* at 1943; *see also id.* (Cooper: "certainly the House of Representatives won't issue their address until they have tried the case and the culprit must have ten days notice to appear at the Bar of the House.").
[30] *Id.* at 1944.

individuals a full and fair presentation of the evidence against them and an opportunity to respond.

C.

As mentioned above, the Delaware Delegates drew from Pennsylvania's Constitution of 1874.[31] The relevant Pennsylvania provision is Article VI: Impeachment and Removal from Office. Section 4 addresses "Condition of official tenure" and "Removal:"

> All officers shall hold their offices on the condition that they behave themselves while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly, and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.[32]

In drafting this provision, the Pennsylvania Delegates drew a distinction between the grounds for impeachment and the grounds for removal by address:

> [William Darlington:] The Constitution now provides that all civil officers shall be impeached and removed from office for misbehavior or infamous crime. A provision also exists, and it is proper that it should exist, for the removal of officers who shall be found

[31] The Pennsylvania Constitution was amended by a convention in 1967. We differentiate by referring to the Constitution of 1874 (Pa. Const. of 1874), and the current Constitution (Pa. Const.). Pa. Const. ("The Constitution of 1874 . . . went into effect January 1, 1874. By statute, 1 Pa.C.S. § 906, the Constitution, as amended by referenda of May 17, 1966, November 8, 1966, May 16, 1967, and April 23, 1968, and as numbered by proclamation of the Governor of July 7, 1967, shall be known and may be cited as the Constitution of 1968.").

[32] Pa. Const. of 1874, art. VI, § 4.

> incompetent, or whose continuance in office would be prejudicial to the public interest, although they may not be convicted of any infamous crime or misdemeanor within the meaning of the Constitution.[33]

In other words, the Pennsylvania Delegates wanted to address a situation where it "may become necessary to remove an officer more speedily than trial by impeachment may accomplish."[34] The goal was to provide "a more speedy remedy" than impeachment or a criminal trial but not one "without due consideration" or the "check" of each House of the General Assembly.[35] As Darlington commented:

> Take for instance your office of State Treasurer, who will be elected by the people. Immediately upon his election he may be discovered to be totally unfit for the office, or he may have designs upon the treasury, by the removal of its funds, and for which his security may be inadequate or insufficient as a remedy, and it may be important that he should be removed, and promptly . . . without waiting for the tedious, troublesome and expensive method of impeachment. The safety of the public interest may require prompt action.[36]

The Pennsylvania Delegates also discussed whether the power to remove included the power to suspend. They decided it did not:

> Mr. CURTIN. Mr. Chairman : Allow me to ask, if the Convention adopt [sic] this section of the article on impeachment and removal from office, do you intend to give the Governor any power to suspend any of

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[33] 1 Benjamin Singerly, Debates of the Convention to Amend the Constitution of Pennsylvania 6 (Harrisburg, State of Pennsylvania 1873); 3 Debates of the Convention to Amend the Constitution of Pennsylvania 231 (hereinafter, "Debates of the Pennsylvania Convention").

[34] 3 Debates of the Pennsylvania Convention 231. *See also* Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 343 (1907) ("As, unfortunately, officers who have been elected or appointed do not always perform their duties with fidelity, it is necessary to have some method by which unfaithful servants may be removed from office.").

[35] 3 Debates of the Pennsylvania Convention 231.

[36] *Id.* Mr. Darlington continued: "So with regard to your Auditor General; he has vast power. He is to be elected by the people. He may pass an account through his office, which may take millions of dollars from the Treasury. It should be in the power of the representatives of the people and the executive to remove him promptly, and if anything serious should be wrong." *Id.*

> the officers of the State temporarily, as for instance the Auditor General or the State Treasurer, or any other officer ?
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> Mr. BIDDLE. Mr. Chairman : I will answer the gentleman from Centre, by saying, speaking for the Committee on Impeachment and Removal from Office, that it was not the intention of that committee to give to the Executive any power of suspending any officer.[37]

The Pennsylvania Delegates then discussed whether to change the language from "after a full hearing" to "after due notice and an opportunity to be heard[,]" which would allow the accused to refuse to speak at his hearing.[38] They decided against it.[39] Finally, they agreed that the Senate would have the power of address, rather than both Houses of the General Assembly.[40]

II.

Having reviewed the debates surrounding the removal provisions in the Pennsylvania and Delaware Constitutions, we answer the questions posed by the General Assembly.

Response to Question 1. Reasonable cause for a bill of address to the Governor may include an indictment, but an indictment standing alone is not sufficient.

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[37] *Id.* at 233. *See also McSorley v. Penn. Tpk. Comm'n*, 134 A.2d 201, 205 (Pa. 1957) ("Of course, Article VI, Section 4, did not confer upon the Governor power to suspend *elected* officers. His power with respect to such is to remove them for reasonable cause on the address of two-thirds of the Senate." (emphasis in original)).

[38] 3 Debates of the Pennsylvania Convention 233–34.

[39] *Id.*

[40] *Id.* at 232–33.

As noted earlier, when a constitutional provision is uncertain as to its meaning, we read the section considering all others to produce a harmonious whole.[41] When addressing removal, the Framers targeted three ways to remove a public official—certain criminal convictions, impeachment and conviction, and a bill of address. The first two means of removal from office concern only convictions. The third—the bill of address—was intended to cast a wider net and to capture criminal conduct that has not yet resulted in a conviction, general misbehavior in office, and incapacity of many kinds. As was discussed during the Delaware Debates:

> Turn to Section 14, and you find another way, and that *may or may not be for offenses committed in office, or for crimes not connected with the office*, or for no crime at all, but for mere misfortune, for mere incapacity, or for unseemly conduct which does not reach a degree of crime of any sort, but more particularly, probably, would be applied to cases of mental or physical disability . . . .[42]

William Spruance spoke at various points about what reasonable cause meant under Delaware's Section 13:

> on the address of two–thirds of the General Assembly to the Governor. The Governor may then remove a man from office–not that he 'shall' but he 'may'. *That might be a case in which a man had misbehaved*

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[41] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011) (when construing a statute "we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole.").

[42] Delaware Constitutional Convention at 2967 (emphasis added). *See also id.* at 3188 ("The Governor may then remove a man from office–not that he 'shall' but he 'may'. That might be a case in which a man had misbehaved himself in office or had become incompetent physically or mentally; then he might be removed from office.").

> *himself in office* or had become incompetent physically or mentally; then he might be removed from office.[43]

The Pennsylvania Delegates also discussed the reason to have a "catch-all" removal provision—the need to take prompt action in certain cases to protect "the safety of the public interest:"

> Take for instance your office of State Treasurer, who will be elected by the people. Immediately upon his election he may be discovered to be totally unfit for the office, or he may have designs upon the treasury, by the removal of its funds, and for which his security may be inadequate or insufficient as a remedy, and it may be important that he should be removed, and promptly . . . without waiting for the tedious, troublesome and expensive method of impeachment. The safety of the public interest may require prompt action.[44]

The Delaware Delegates remarked about the breadth of the reasons for removal: "there is another class of cases where there is no crime, but there is physical disability, or 1000 other things that might make it desirable that a man should be taken off the Bench or removed from any other office."[45] Thus, reasonable cause can include an indictment. For instance, the public official might be indicted for a crime that makes it impossible for an officer to perform their duties.[46] Nonetheless,

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[43] *Id.* at 3188 (emphasis added). We note that "misbehavior in office" are the words used to describe criminal conduct in Article XV, Section 6 of the Delaware Constitution.

[44] 3 Debates of the Pennsylvania Convention 231. Mr. Darlington went on: "So with regard to your Auditor General; he has vast power. He is to be elected by the people. He may pass an account through his office, which may take millions of dollars from the Treasury. It should be in the power of the representatives of the people and the executive to remove him promptly, and if anything serious should be wrong." *Id.*

[45] Delaware Constitutional Convention at 1855.

[46] Saul Ewing Arstein & Lehr Amicus Brief in the Affirmative at 10–11 "(hereinafter, Saul Ewing Br.)" (citing *Sussex County Dept. of Elections v. Sussex County Republican Committee*, 58 A.3d

as we explain later, before a bill of address, there must be a hearing and an opportunity for the accused public official to be heard on the grounds for removal. The legislative body must also make a specific finding of reasonable cause to support the removal.[47] While the conduct underlying an indictment may ultimately support that finding, the mere fact of an indictment is not reasonable cause.

Response to Question 2. The Governor's authority to remove a public official upon a bill of address does not include the authority to take a lesser action such as suspension.

Section 13 states that the Governor may "remove any officer." It does not mention suspension. During the Delaware Debates, all discussion about Section 13 focused on removing an officer from office. The Delaware Delegates did not contemplate a lesser included remedy, such as the ability to suspend an officer.

While the Delaware Delegates did not specifically address the power to suspend, the Pennsylvania Delegates were clear:

> Mr. CURTIN. Mr. Chairman : Allow me to ask, if the Convention adopt [sic] this section of the article on impeachment and removal from

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418 (Del. 2013) (finding that a candidate's indictment on 113 counts of child abuse created an "incapacity" such that he could not continue in the race)).

[47] *Id.* at 1939 (explaining that "the Legislature" will be "the judge of the cause for which [the officer] should be expelled."). Amicus points us to another quote from Spruance and argues that Spruance intended to limit reasonable cause to conduct that is not a crime. Amicus Brief of Rodney Smolla in Support of the Negative Position at 13 (quoting Delaware Constitutional Convention at 1855 (Spruance: "But there is another class of cases where there is no crime, but there is physical disability, or 1000 other things that might make it desirable that a man should be taken off the Bench or removed from any other office.")). We do not read these remarks to exclude criminal conduct from reasonable cause. Instead, Spruance was simply describing grounds for removal other than through criminal convictions. As noted above, Spruance believed that criminal conduct would be included in Section 13.

> office, do you intend to give the Governor any power to suspend any of the officers of the State temporarily, as for instance the Auditor General or the State Treasurer, or any other officer ?
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> Mr. BIDDLE. Mr. Chairman : I will answer the gentleman from Centre, by saying, speaking for the Committee on Impeachment and Removal from Office, that it was not the intention of that committee to give to the Executive any power of suspending any officer.[48]

In *In re Matter of Rowe*, the Delaware Court on the Judiciary did interpret another constitutional provision, which gave the Court on the Judiciary the authority to censure, remove, or retire any judicial officer appointed by the Governor.[49] The court found the language of Article IV, Section 37 implicitly included the power to suspend judicial officers.[50] It reasoned that:

> The constitution provides a system of judicial discipline which is designed to deal with all cases which might arise in any varied factual context. We cannot accept the argument that the drafters of this important amendment to the constitution intended to limit the disciplinary action to "censure, removal, or retirement" with no sanctions available short of retirement or removal except a mere censure.[51]

Article IV, Section 37 is different, however, from Article III, Section 13. Section 13 concerns the removal of civil officers (with exceptions), whereas Section 37 is limited to judicial officers. And Section 37 includes more than removal. It

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[48] 3 Debates of the Pennsylvania Convention 233.
[49] 566 A.2d 1001, 1008–10 (Del. Jud. 1989) (discussing Del. Const., art. IV, § 37).
[50] *Id.* ("We conclude that the power to suspend a judicial officer is inherent in the express powers granted to the Court pursuant to art. IV, § 37 of the Delaware Constitution.").
[51] *Id.* at 1010.

addresses a range of powers—"censure, removal, or retirement"—not found in Section 13. Censure alone could cover several types of disciplinary sanctions.

Section 13 also allows the General Assembly and Governor to remove both elected and appointed officers, not just appointed officers. Pennsylvania saw this as a key distinction in its analogous provision. In *McSorley v. Pennsylvania Turnpike Commission*, the Pennsylvania Supreme Court held that the Pennsylvania Constitution of 1874 gave the governor the right to suspend appointed officials—but not elected ones—given his power to remove appointees at his pleasure.[52] The Delaware Delegates, on the other hand, intentionally left out the Pennsylvania provision allowing the Governor to remove appointees at his pleasure.[53] Article III, Section 13 of the Delaware Constitution, as such, does not include the power to suspend officials. To interpret Section 13 that broadly would expand its power beyond what its Framers contemplated.[54]

Reading the removal provision to include lesser powers would also have significant policy implications. If the Governor could suspend or conditionally

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[52] 134 A.2d at 205 ("Of course, Article VI, Section 4, did not confer upon the Governor power to suspend *elected* officers. His power with respect to such is to remove them for reasonable cause on the address of two-thirds of the Senate. As to appointed officers, the power of the appointor under Article VI, Section 4, to remove appointees at his pleasure embraces at all times the power to remove for reasonable cause, as well, and that power includes the right to suspend for cause, as we have already seen.").

[53] Delaware Constitutional Convention at 1938.

[54] *See McSorley*, 134 A.2d at 205 ("It would do violence to the words employed to infer anything more.").

suspend public officers, this would create limbo in those offices, and a new level of power in the executive, one of supervisory authority. While the Constitution provides a method for replacement of officers when there is a vacancy in office,[55] there is no provision for dealing with officers who have been suspended, and no potential check on any conditions the Governor could choose to adopt before the officers could be reinstated. Functionally, this would be a delegation of legislative power to the executive, and is not a reasonable reading of the provision.

Finally, we need not reach whether the General Assembly's bill of address to the Governor can recommend suspension rather than removal, as we find that the Governor cannot suspend public officials.

Response to Question 3. A hearing is required prior to the vote on a bill of address.

Section 13 states that "[t]he person against whom the General Assembly may be about to proceed shall receive notice thereof . . . " but does not address what it means to proceed against a public officer. We therefore turn to the Debates.

The delegates in both conventions raised the need for a hearing prior to a vote on the charges. To quote from the Delaware Delegates during the Constitutional Convention: "A man is entitled, when he gets this notice, to a hearing, and in the

[55] Del. Const., art. III, § 9.

question of introducing testimony, and the things that are to be brought in . . . ."[56] The Pennsylvania Delegates agreed: "An officer elected by the people should only be removed in some proper and judicious way . . . ."[57] And the Pennsylvania Delegates added "a full hearing" and "due notice" to their provision during their debates.[58] One delegate added: "I desire to preserve the right to trial and that I do not desire to lodge in any person, however respectable or conservative, the right of removal without cause, and without giving the accused a fair and full hearing and an impartial trial[.]"[59]

As the Framers anticipated, the notice requirement allows the individual time to provide a defense and to allow both Houses to consider the matter.[60] The hearing serves as "a more speedy remedy" than impeachment, but not one "without due consideration" or the "check" of each House of the General Assembly.[61] As stated succinctly by Spruance: "Suppose proceedings were started in the House. They would immediately give notice to the man that charges had been made. They would give him that notice, and they could not take it up for vote until the expiration of that

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[56] Delaware Constitutional Convention at 1944. *See also id.* at 1941 (Spruance: "there is no case in which a man ought to be removed by the Governor upon the address of the General Assembly unless he should have had fair notice of it and an opportunity to be heard . . . .").
[57] 3 Debates of the Pennsylvania Convention 231.
[58] *Id.* at 232.
[59] *Id.*
[60] Delaware Constitutional Convention at 1945 (Wilson T. Cavender: "As to the question of the length of time, I am opposed to shortening the time. I think when a man is to be tried he ought to have ample notice in order that he may prepare himself for his defense.").
[61] 3 Debates of the Pennsylvania Convention 231.

ten days."[62] The "notice" of "charges" required at least 10 days for the accused to mount a defense. The Delaware Delegates also anticipated that the hearing would take place before any vote on the charges and the hearing could take several days.[63]

While the Delaware Delegates were discussing the structure of the hearing and whether it needed to take place in each House of the General Assembly, Cooper asked, "[l]egislative enactment would provide the formula, would it?" and Spruance replied, "I think so."[64] We understand those remarks to mean that the General Assembly can decide how the hearing will proceed, other than the minimum requirement of the public officer's notice of the charges and the right to be heard.

Response to Question 3a. and b. A hearing in the first House or a joint hearing satisfies the hearing requirement.

While Section 13 addresses the notice requirement and refers to a proceeding, those references do not explain what the hearing requires, nor which House must conduct the hearing. The Delaware Debates offer guidance on the question.[65] The

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[62] Delaware Constitutional Convention at 1943.

[63] *See id.* at 1940 (Saulsbury: "Suppose the proceeding started in the House of Representatives, and after it begins its sessions, this notice could be served right away, but [the officer] is entitled to have ten days notice. Then he is entitled to have a hearing before that house, which would take several days. Then that matter goes over to the Senate and he is entitled there to have ten days notice, and to have a hearing there, and, altogether, it would necessarily consume thirty days at the very least."); *id.* at 1941 (discussing the notice requirement as a way "to give notice to the accused that on such a day there would be taken up for consideration these charges which are specified. . . . It is a matter of a great deal of consequence that when a man is about to be proceeded upon, that he have proper notice to defend himself.").

[64] *Id.* at 1945.

[65] The Pennsylvania debates are less applicable here, because the Pennsylvania Constitution removal provision limited the removal hearing to the Senate alone. 3 Debates of the Pennsylvania Convention 232–33.

conduct the hearing. The Delaware Debates offer guidance on the question.[66] The Delaware Delegates were concerned about the notice and hearing requirement taking too long, and discussed the issues that would arise with two separate trials:

> MARTIN B. BURRIS: Then he must have two trials.
>
> EZEKIEL W. COOPER: Yes.
>
> MARTIN B. BURRIS: Why not a trial upon joint Assembly?
>
> EZEKIEL W. COOPER: That is exactly what I mean. Change the phraseology in some way, or else confine it to one house.
>
> . . . .
>
> WILLIAM C. SPRUANCE: I insist upon it that this word is right as it is, and that there is but one notice required. If it had said ten days notice before the day on which either house of the General Assembly shall proceed, then it would require two notices. But ten days upon which either house, that means the first one that has the hearing.
>
> EZEKIEL W. COOPER: Yes; but is a Senator going to agree to issue an address to the Governor to remove an officer when he has heard no statement of the case, or no trial, or when the trial has been in the House?
>
> WILLIAM C. SPRUANCE: I do not know. If that testimony was taken in writing and brought up, it might be sufficient. I do not know how that may be.
>
> EZEKIEL W. COOPER: Legislative enactment would provide the formula, would it?
>
> WILLIAM C. SPRUANCE: I think so.[67]

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[66] The Pennsylvania debates are less applicable here, because the Pennsylvania Constitution removal provision limited the removal hearing to the Senate alone. 3 Debates of the Pennsylvania Convention 232–33.

[67] Delaware Constitutional Convention at 1944–45.

The Delaware Delegates concluded that one hearing would be sufficient, or that the General Assembly could conduct a joint hearing. This reading is supported by the thoughtful comments from one of the amici:

> There is also no reason to think that the members of one chamber could not rely on a report and transcript generated by the other chamber—after all, if, in impeachment proceedings, the members of the U.S. Senate can rely on a report and summary generated by a committee of the Senate, there is no reason why the members of the Delaware House could not . . . .[68]

It is acceptable to have one hearing—in either House of the General Assembly which has provided the ten-day notice—or a joint hearing before both Houses.

Response to Question 3c. Both Houses would issue a joint notice ten days prior to the hearing. The individual must have a hearing, which preferably would include the right to attend, be represented by counsel, call witnesses, and introduce evidence. The other parameters of the hearing are within the discretion of the General Assembly.

The Delaware Delegates described the opportunity to be heard as akin to a "jury trial."[69] By this time, the role of the jury and structure of a jury trial were largely analogous to what we have today.[70] Section 13's notice requirement protected the individual's right to prepare for the "trial:" "A proceeding of this sort

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[68] Saul Ewing Br. at 23.

[69] Delaware Constitutional Convention at 1943.

[70] *See, e.g.*, Stephan Landsman & James F. Holderman, *The Evolution of the Jury Trial in America*, 37 Litigation 32, 35 (Fall 2010) ("Until the nineteenth century, it was thought that the jury, at least arguably, had the authority to decide the law for itself. This option was ever more firmly hemmed in and forcefully rejected in cases like *Sparf v. United States*, 156 U.S. 51 (1895) . . . . The nineteenth- and early twentieth-century 'modern' jury retained the size (12) and decision rule (unanimity) that juries had relied on for hundreds of years. . . . This jury was far more passive than what had come before . . . .").

would not be brought, or is not likely to be brought against a man unless there is pretty strong ground against him."[71] As such, the Delaware Delegates argued against providing only five days' notice: it "is pretty short notice for a man to be brought up in a round term, and to say to him, 'We are going to kick you out of office', and to furnish him with the charges and give him only five days in which to make his defense."[72] Although the Delaware Debates do not provide a definitive answer to the question, given the reference to a trial, and a trial similar to one involving a jury, we believe the Delaware Delegates would have wanted to give the accused the procedural protections associated with a trial—the right to be represented by counsel, the right to offer evidence, and the right to call witnesses—as would be expected for an individual making their own "defense."

The Pennsylvania Delegates debated changing the language of their provision from "after a full hearing" to "after due notice and an opportunity to be heard" because "[i]t might happen that the accused will say nothing, and then, according to the terms of the proposition, you never could remove him."[73] The Delaware provision dropped the reference to a full hearing, and instead simply refers to the proceeding. We conclude from these comments that the hearing need not be a "full hearing," which is to say, an individual need not testify on their own behalf. As

[71] Delaware Constitutional Convention at 1940.
[72] *Id.* at 1941.
[73] 3 Debates of the Pennsylvania Convention 233–34.

amicus points out, this proceeding is not a criminal trial, and there is no "determination of guilt or innocence . . . the only question is whether 'reasonable cause' exists for removal from office."[74] As such, the public officer must be offered the chance to mount a defense but need not testify.

Response to Question 4. A Joint Resolution by both Houses is required at least ten days before the hearing in the first House or before a joint hearing.

As discussed above, this was a point that was heavily debated at the Delaware Constitutional Convention. Wilson T. Cavender, a Delaware State Senator from Kent County, carried the argument:

> The spirit of the language of this section, it seems to me, is very clear that this notice should be given in the shape of a joint resolution. It seems to me it would not be proper in any other shape.
>
> What is the General Assembly? The General Assembly is not the House, nor the Senate separately, but it is the Senate and House both, and a notice coming from the General Assembly would come in the shape of a joint resolution.[75]

The Delegates contemplated that the General Assembly would adopt a Joint Resolution at least ten days before the hearing date. Either House may hold a hearing after that 10-day period has elapsed, or the General Assembly may hold a joint hearing.

Response to Question 5. There is no appeal from the Governor's decision. We do not express an opinion on whether judicial review is available through other avenues.

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[74] Saul Ewing Br. at 23–24.
[75] Delaware Constitutional Convention at 1945.

Section 13 has no mechanism for a direct appeal of the Governor's decision to remove an official upon a bill of address. We were not asked to explore whether there are other avenues for relief through the courts.

/s/ Collins J. Seitz, Jr.
Chief Justice

/s/ Gary F. Traynor
Justice

/s/ Karen L. Valihura
Justice

/s/ Tamika R. Montgomery-Reeves
Justice

/s/ James T. Vaughn, Jr.
Justice